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No. 85-1685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANTHONY HERBERT,

Petitioner,

v.

BARRY LANDO, MIKE WALLACE,
COLUMBIA BROADCASTING SYSTEM, INC., AND
ATLANTIC MONTHLY COMPANY,

Respondents.

OPPOSITION ON BEHALF OF ATLANTIC MONTHLY COMPANY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Neither of the questions presented by Petitioner Herbert raises any issue germane to the grounds on which summary judgment was granted Respondent Atlantic Monthly Company below. Petitioner has failed to state a question as to this Respondent satisfying Supreme Court Rule 21.

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STATEMENT OF CASE

Following a tour of duty in Vietnam in 1968-69, Petitioner Herbert, now a retired Army officer, accused his superior officers of covering up war crimes and of relieving him from command of the 2d Battalion of the 173d Airborne Brigrade because he had reported such crimes. Petitioner recounted his alleged experiences in a book entitled *Soldier*. He appeared on television, including three times on "The Dick Cavett Show," to promote his story.

Respondents Lando, Wallace and Columbia Broadcasting System, Inc. (CBS), produced a television report on Petitioner's allegations.[1] This report was aired by CBS as part of its weekly "60 Minutes" program on February 4, 1973. The report questioned Mr. Herbert's version of some of the events which he had publicized.

Respondent Lando subsequently wrote a magazine article about his experiences in researching and developing the "60 Minutes" segment on Petitioner Herbert. The article, which was entitled "The Herbert Affair," was published by Respondent Atlantic Monthly Company in the May 1973 issue of *Atlantic* magazine. It discussed Mr. Lando's progressive disillusionment with Mr. Herbert's story as he probed for the facts.

It is undisputed that Atlantic Monthly did not solicit the article authored by Mr. Lando. Similarly, it is undisputed that Mr. Lando, whom the *Atlantic*'s ed-

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[1] The parties are as stated in the caption. Pursuant to Supreme Court Rule 28.1, Respondent Atlantic Monthly Company represents that it has no parent, partially-owned subsidiary, or affiliate.

itors reasonably believed to be a responsible journalist,[2] presented the magazine with an inherently plausible article. *Atlantic*'s editing process with respect to the article was routine. Thus, although the magazine could not conduct an independent investigation of the facts represented in the article (*Atlantic* maintains no research department), Mr. Lando responded to whatever questions were raised by *Atlantic*'s editors or attorneys, in some cases modifying the article. *Atlantic*'s "streamer" describing the article was an accurate summary of the article and merely reflected its contents. In addition, Petitioner Herbert was aware of the article before its publication and made no effort to supply any information contrary to it. If the article contained defamatory falsehoods about Mr. Herbert, Atlantic Monthly had no knowledge of their actual or probable falsity.[3]

In light of the total lack of evidence, even after extensive discovery, of any knowledge of actual or probable falsity on the part of Atlantic Monthly, the magazine moved for summary judgment dismissing

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[2] Mr. Lando

> was known to *Atlantic's* editors to be a former reporter with *Time* magazine and present producer of a respected . . . national news program. Lando had previously written a piece which the Atlantic Monthly published. At the time of that publication (1967), *Atlantic's* editors had been favorably impressed with Lando's reportorial skills; and [Atlantic Monthly personnel] had made inquiry about Lando at *Time*, receiving an equally favorable report.

Herbert v. Lando, 596 F. Supp. 1178, 1229 (S.D.N.Y. 1984), App. 127a.

[3] *Herbert v. Lando*, 596 F. Supp. 1178, 1228-31 (S.D.N.Y. 1984), App. 125a-132a.

Mr. Herbert's complaint. The District Court granted summary judgment to Atlantic Monthly on this ground, expressly finding that

> "there is no proof that *Atlantic's* editors knew of the actual or probable falsity of anything in the article."

Herbert v. Lando, 596 F. Supp. 1178, 1231 (S.D.N.Y. 1984), App. 132a. The Court of Appeals agreed, labelling the rationale of the District Court "compelling," and stating that

> "[o]ur independent review of the evidence for actual malice . . . reveals to us no indication that *Atlantic Monthly* exercised malice in publishing Lando's article."

Herbert v. Lando, 781 F.2d 298, 308 (2d Cir. 1986), App. 15a.

SUMMARY OF ARGUMENT

Petitioner Herbert has failed to present a question to this Court raising an issue with respect to the grounds on which summary judgment was granted to Respondent Atlantic Monthly Company. Petitioner Herbert failed to present any evidence of actual malice on the part of Atlantic Monthly, and summary judgment was appropriately granted to the magazine on that ground. Mr. Herbert's petition for certiorari accordingly must be denied as to Atlantic Monthly.

ARGUMENT

As the District Court observed below (596 F. Supp. at 1197, 57a), Petitioner Herbert tends to "lump" all the "defendants together indiscriminately[,] . . . [b]ut

there are significant differences in status." In his petition for certiorari petitioner Herbert again disregards these differences. As a result, the questions tendered this Court have nothing to do with the rationale employed by the District Court in granting, and the Court of Appeals in affirming, summary judgment for Atlantic Monthly.

The first question tendered by Petitioner Herbert is

> "Whether the Court of Appeals correctly held that specific defamatory falsehoods that may have been made with actual malice should not be actionable if they are 'subsidiary' to 'larger' libels that have been found to be non-actionable under that same standard of proof."[4]

Even if this question is resolved in Petitioner's favor, it in no way calls into question the correctness of the lower courts' holdings that no evidence had been adduced by Petitioner of "actual malice" on the part of Atlantic Monthly.

The second question tendered by the Petitioner is

> "Whether the First Amendment prohibits a libel action based upon the particular defamatory meanings conveyed by a publication as a whole, as distinguished from specific individual statements contained in the publication."[5]

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[4] Petition for Writ of Certiorari at (i).

[5] *Id.*

This question similarly does not challenge the basis on which the action was dismissed against this respondent.

"Actual malice" is a term of art meaning knowing falsity or reckless disregard for the truth.[6] Reckless disregard is measured not by whether a reasonable publisher would have published the material, but whether the publisher in fact "entertained serious doubts" as to the truth of the publication at the time of the publication. *See, e.g., St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

The lower courts found no triable issue of "actual malice" on the part of Atlantic Monthly as to *any* of the eleven statements alleged by Petitioner to be defamatory or as to anything else. Since it is conceded that a finding of "actual malice" is required for a judgment against each Respondent, the trial court's dismissal of the action against Atlantic Monthly must be affirmed whether or not this Court agrees with the Petitioner that two of the eleven statements are actionable or that the effect of the article as a whole is separately defamatory.

Nor can this Court's forthcoming ruling in *Liberty Lobby v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1983),

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[6] Under *New York Times v. Sullivan*, 376 U.S. 254 (1964), a public official (Mr. Herbert was an Army officer) or public figure (Mr. Herbert wrote a book and appeared publicly) cannot successfully sue a publication for defamation concerning a public issue (war crimes and a cover-up) unless he shows that the allegedly defamatory material was published with "actual malice." *See also Philadelphia Newspapers, Inc. v. Hepps*, ___U.S. ___, ___, 54 U.S.L.W. 4373, 4374 (1986); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 104 S. Ct. 1949, 1965 and n.30 (1984); *Gertz v. Robert Welch*, 418 U.S. 323, 342 (1974).

cert. granted, ___U.S. ___, 105 S. Ct. 2672 (1985) (No. 84-1602), affect Atlantic Monthly's dismissal in this case. The question under review in *Liberty Lobby* is whether a public figure suing for libel must show with "convincing clarity" that actual malice exists in order to withstand a motion for summary judgment. Because the lower courts found "*no* proof" and "*no* indication" of actual malice on the part of Atlantic Monthly,[7] the standard of proof is irrelevant. Nothing in Petitioner's discussion of *Liberty Lobby* raises issues that are in any way germane to whether the Atlantic Monthly can be required to incur the cost of a jury trial in the absence of any evidence of "actual malice" on its part.[8]

As this Court has repeatedly observed, the First Amendment manifests an important public policy in favor of freedom of the press. It is intended to foster and to protect robust public debate, and this interest is particularly important with respect to public officials and public figures, as is the case here. This

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[7] 596 F. Supp. at 1231, App. 132a (emphasis added); 781 F.2d at 308, App. 15a (emphasis added). The court of appeals, after an independent review of the record, properly rejected Mr. Herbert's efforts to infer actual malice on the basis of the failure of Atlantic Monthly to independently investigate Mr. Lando's article or on the basis of information supplied by Mr. Herbert's literary agent after publication of Mr. Lando's article. *See, e.g.*, 781 F.2d at 308-09 (App. 15a-16a), *citing St. Amant v. Thompson, supra; Rosenbloom v. Metromedia*, 403 U.S. 29, 55 (1971) (and other authorities). As the Court of Appeals indicated, many of the actions of Atlantic Monthly of which Mr. Herbert complained below were "indications of responsible editorial behavior, not actual malice." 781 F.2d at 308 (App. 6a). In any event, the petition does not ask this Court to review these rulings.

[8] Petition for Writ of Certiorari at 22-25.

unfortunate litigation has now dragged on for some twelve years. During this time, Petitioner has presented no evidence that Atlantic Monthly published anything about him with actual malice. This kind of costly and protracted delay in and of itself may cause many publishers to think twice before printing an article on a potentially controversial issue. It definitely imposes a burden discouraging debate, and it thus may result in exactly the kind of "self-censorship" (*see St. Amant v. Thompson, supra*, 390 U.S. at 732) and "chilling effect" (*Philadelphia Newspapers, Inc. v. Hepps, supra*, 54 U.S.L.W. at 4375) which the First Amendment was intended to prevent. *See, e.g., Pacific Gas and Electric Company v. Public Utilities Commission of California*, ___U.S. ___, 106 S. Ct. 903, 910 (1986), citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

CONCLUSION

The Petition for Writ of Certiorari must be denied with respect to Respondent Atlantic Monthly.

Respectfully submitted,

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